

On March 28, 2007 appellant, then 64 years old, filed an occupational disease claim (Form CA-2) alleging that she sustained chronic obstructive pulmonary disease (COPD) and pneumoconiosis as a result of her employment. She first learned of the condition on January 30,

2007 after reviewing a chest x-ray. The employing establishment controverted the claim. The record reveals appellant stopped working on October 1, 2004.

By letter dated March 30, 2007, the Office notified appellant of the deficiencies in her claim and requested additional information.

In an undated statement, appellant alleged that she worked at the employing establishment from August 1990 until April 1991 and from January 1993 through October 2004, during which time she continuously inhaled dust in her capacity as a clerk, custodian and convey car dump operator. She also noted that she smoked about a pack of cigarettes a day from her late 20's until age 50 but that she had not smoked for 15 years.

In a March 6, 2007 medical report, Dr. William C. Houser, a Board-certified pulmonologist, discussed appellant's medical history and reported her claims that she was exposed to coal dust, fly ash, asbestos and other respiratory irritants while working at the employing establishment. Diagnostic tests indicated pneumoconiosis plus changes of emphysema. Dr. Houser diagnosed severe chronic obstructive pulmonary disorder (COPD), which he opined was due to appellant's former cigarette smoking and exposure to respiratory irritants during her 12-year employment at the employing establishment. He advised that, as well documented in medical literature, exposure to dust, smoke and fumes can cause COPD and if the disease is present, exposure to respiratory irritants can aggravate the disease process and over a period of time resolve in a progression of the disease.

In a medical report dated November 22, 2006, Dr. Stephen Adams, Board-certified in family medicine, reviewed appellant's file at the request of the employing establishment. He reviewed appellant's occupational history and the medical report provided by Dr. Houser. Dr. Adams stated that appellant began working directly with coal in 1998 and was diagnosed with COPD less than three years later. He opined that, given the slowly progressive nature of COPD, the onset of the disease in all likelihood predated her job duties. Dr. Adams noted that appellant smoked cigarettes since age 17 or 18 and opined that, in the absence of excessive exposure to respiratory irritants, her decades of smoking should assume as the direct cause of her disease.<sup>1</sup>

On June 28, 2007 the Office referred the record and a statement of accepted facts to an Office medical adviser, Dr. A.E. Anderson. In a June 29, 2007 report, Dr. Anderson attributed appellant's COPD was a function of her smoking cigarettes for years. He referred to a report from the employing establishment, which stated that the record measured exposure to respirable dust in the work area was well below permissible limits and opined that this exposure did not cause or aggravate her COPD.

On July 11, 2007 the Office referred appellant to Dr. Harold Dale Haller, Jr., a Board-certified pulmonologist, for a second opinion regarding whether her exposure to irritants in the workplace caused or aggravated a pulmonary condition.

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<sup>1</sup> Dr. Adams noted that appellant's medical records indicated that she had begun smoking at age 17 or 18, even though she reported to Dr. Houser that she did not begin until her late 20s.

In an August 13, 2007 medical report, Dr. Haller reviewed appellant's medical and occupational history and performed a full physical examination. He diagnosed moderate-to-moderately severe COPD, principally of the emphysematous type. Dr. Haller did not have data on the dust exposure levels associated with appellant's work or any medical records for the period after her herniorrhaphy, which was when her symptoms first began. He opined that it was very unlikely that the COPD was due to her work exposure, but rather her cigarette smoking was the major contributor. Dr. Haller stated that appellant's principle dust exposure period was only about six or seven months maximum and that, unless the levels of exposures was exceedingly high, it was very unlikely the dust exposure would be more than a very minor factor in her COPD. He noted that, in the presence of cigarette use, any kind of dust can potentially accelerate the disease. Dr. Haller opined that appellant's symptoms started basically after her herniorrhaphy, which resulted in a pneumonia that could have damaged her lungs and contributed to worsening of the COPD. Further, he stated that appellant's obesity, potential cardiac dysfunction, anemia and exposure to second hand smoke from her husband and mother may have also contributed to her dyspnea and COPD.

By decision dated September 14, 2007, the Office denied appellant's claim finding that she did not establish that she sustained an injury in the performance of duty.

On September 27, 2007 appellant, through her attorney, filed a request for an oral hearing before a hearing representative.

In an October 22, 2007 medical report, Dr. Haller reviewed additional information concerning appellant's occupational history at the request of appellant's counsel. He stated that the additional information did not create any appreciable changes in his findings. Dr. Haller advised that the principle cause of appellant's medical condition remained her tobacco abuse both primary and through second-hand exposure.

On February 25, 2008 appellant testified at an oral hearing before a hearing representative that she was exposed to dust at the employing establishment beginning in August 1990 and in several different positions through 2004.

By decision dated May 13, 2008, the hearing representative affirmed the denial of the claim, finding that there was no rationalized medical opinion that appellant's condition was causally related to her employment. Dr. Haller's report, finding that appellant did not have a work-related pulmonary condition, constituted the weight of the medical evidence as it was based on a complete and accurate factual and medical background.

### **LEGAL PRECEDENT**

An employee seeking compensation under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of appellant's claim by the weight of the reliable, probative and substantial evidence,<sup>3</sup> including that she is an "employee" within the

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *J.P.*, 59 ECAB \_\_\_\_ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

meaning of the Act<sup>4</sup> and that she filed her claim within the applicable time limitation.<sup>5</sup> The employee must also establish that she sustained an injury in the performance of duty as alleged and that her disability for work, if any, was causally related to the employment injury.<sup>6</sup>

Proceedings under the Act are not adversarial in nature nor are the Office a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, it shares the responsibility in the development of evidence.<sup>7</sup> Once it has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible.<sup>8</sup> The Office has an obligation to see that justice is done.<sup>9</sup> The Board has stated that, when it selects a physician for an opinion on causal relationship, it has an obligation to secure, if necessary, clarification of the physician's report and to have a proper evaluation made.<sup>10</sup> Where the Office referred appellant for a second opinion physician and the report did not adequately address the relevant issues, it should secure a report on the relevant issues.<sup>11</sup>

### ANALYSIS

The issue is whether appellant established that her inhalation of irritants during her employment caused or aggravated her COPD. The Board finds this case is not in posture for a decision.

Appellant submitted a March 6, 2007 medical report from Dr. Houser, who diagnosed COPD and opined that the condition was caused by cigarette smoking and exposure to respiratory irritants during her federal employment. The Office determined that a second medical opinion was necessary and referred appellant to Dr. Haller, a Board-certified pulmonologist. In an August 13, 2007 medical report, Dr. Haller opined that, because appellant's principle dust exposure lasted only six or seven months, it was unlikely the exposure would be more than a very minor factor in her COPD. However, he noted that, in the presence of cigarette use, any kind of dust can potentially accelerate the disease. Dr. Haller related appellant's condition primarily to years of cigarette smoking and other potential causes, including obesity, cardiac dysfunction, anemia and exposure to second-hand smoke. However, he noted that he did not have access to information regarding the dust exposure levels during appellant's employment or the medical records for the time her symptoms began. Although,

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<sup>4</sup> See *M.H.*, 59 ECAB \_\_\_\_ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); See 5 U.S.C. § 8101(1).

<sup>5</sup> *R.C.*, 59 ECAB \_\_\_\_ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); see 5 U.S.C. § 8122.

<sup>6</sup> *G.T.*, 59 ECAB \_\_\_\_ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>7</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>8</sup> *Edward Schoening*, 41 ECAB 277 (1989).

<sup>9</sup> *Lourdes Davila*, 45 ECAB 139 (1993).

<sup>10</sup> *Steven P. Anderson*, 51 ECAB 525 (2000).

<sup>11</sup> *Robert Kirby*, 51 ECAB 474 (2000).

Dr. Haller noted the lack of certain information, he noted that appellant's exposure to dust contributed to her COPD.<sup>12</sup> In a subsequent October 22, 2007 medical report, Dr. Haller opined that appellant's COPD was principally caused by tobacco abuse.

The Board finds that Dr. Haller did not provide a fully-rationalized opinion on whether appellant's employment aggravated her COPD. Dr. Haller focused his inquiry solely on whether appellant's exposure to irritants was the primary cause of her condition. It is well-established that a work factor does not have to materially contribute to a disabling condition for appellant to be entitled to compensation benefits. If the medical evidence reveals that a work factor contributed in any way to an appellant's condition, such condition would be compensable.<sup>13</sup> As the Office undertook development of the medical evidence by referring appellant for a second opinion physician, it should secure a report adequately addressing the relevant issues of whether appellant's exposure to irritants during her employment contributed in any way to her COPD.<sup>14</sup>

The Board further notes that Dr. Haller noted that he did not have access to certain medical records during the period after appellant's herniorrhaphy, which was when her symptoms first started to appear. Dr. Haller premised his opinion on the fact that appellant was only exposed to the irritants for six to seven months, but noted that he did not have access to exposure information. The evidence of record indicates that appellant was exposed to dust and other irritants throughout her employment, from 1990 to 2004. The Office should further develop this aspect of the claim.

The Board finds that Dr. Haller's medical opinion is unclear on the issue of whether appellant's COPD is related to her employment. On remand, the Office should submit an updated statement of facts, along with a complete medical record to Dr. Haller for clarification on the issue of whether appellant's work-related exposure to irritants aggravated her medical condition. After this and such other development as the Office deems necessary, it should issue an appropriate decision.

### **CONCLUSION**

The Board finds that this case is not in posture on the issue of whether appellant sustained an injury in the performance of duty causally related to her employment factors.

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<sup>12</sup> See *infra* note 15.

<sup>13</sup> See *Arnold Gustafson*, 41 ECAB 131 (1989); *Beth Chaput*, 37 ECAB 158 (1985).

<sup>14</sup> *Peter C. Belkind*, 56 ECAB 580 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 14, 2007 decision of the Office of Workers' Compensation Programs and the May 13, 2008 decision of the hearing representative are set aside and remanded for further development consistent with this decision of the Board.

Issued: April 6, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board